

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On November 15, 2010 appellant, then a 44-year-old staff pharmacist, filed a notice of occupational disease (Form CA-2) claiming that she sustained anxiety, emotional distress, consequential headaches and hypertension in the performance of duty on or before September 8, 2008. She attributed these conditions to a pattern of supervisory harassment and discrimination due to her Nigerian ethnicity and national origin, hostility, reprisals, threats and retaliation for filing Equal Employment Opportunity (EEO) complaints. Appellant was off work for intermittent periods from 2009 through 2011.

In a December 1, 2010 letter, OWCP advised appellant of the type of evidence needed to establish her claim, including a detailed description of the work incidents alleged to have caused the claimed conditions, and corroborating witness statements. It also requested a report from appellant's attending physician explaining how and why the identified work factors would cause the claimed conditions. OWCP afforded appellant 30 days to submit such evidence.

In response, appellant provided numerous statements, e-mails, and administrative documents which she asserted demonstrated a pattern of harassment, discrimination, and disparate treatment by supervisors and coworkers, as follows: May 2003, March 2005, and February 2010 job reassignments; a poor performance appraisal in 2004 written by Supervisor R.C. in retaliation for appellant filing an EEO claim against him and Dr. B.K.; a poor performance appraisal in 2005 in retaliation for filing an EEO claim; being denied assistance in performing narcotics inspections in November 2005; a May 15, 2008 allegation that she allowed a subordinate to lock an employee's computer; inadequate training in E-Pharmacy in April 2009; a delay in being assigned an internship preceptor in June 2009; denial of a clerkship rotation in July 2009; being issued LWOP (leave without pay) in June 2009; December 2009 notations in a record system that a physician was angry when appellant asked him to verify a prescription; an EEO manager leaving appellant's confidential folder in the employing establishment canteen on February 10, 2010; and retaliation on February 11 and 12, 2010 when appellant refused to return the folder to the employing establishment.

A coworker provided a November 19, 2010 statement alleging that appellant was treated differently from other pharmacists due to her ethnicity and national origin. A second coworker submitted a November 17, 2010 statement generally corroborating appellant's allegations of a hostile work environment. The coworker alleged that Dr. B.K. instructed her not to associate with appellant.

Employing establishment supervisors provided January 2011 statements generally refuting appellant's allegations of discrimination, harassment, retaliation, disparate treatment, and malfeasance.

Appellant also submitted medical evidence. Dr. Pamela J. Henderson, an attending licensed clinical psychologist, provided chart notes dated from September 25 to November 12,

2009 relating appellant's complaints of anxiety and insomnia. Dr. Wesley Hoenshell, an attending Board-certified family practitioner, treated appellant for hypertension beginning in 2005. He held appellant off work from September 4 to October 2, 2009 and from December 13, 2010 to February 15, 2011 due to anxiety. Dr. Hoenshell opined that appellant should have no contact with Dr. B.K as appellant alleged that he harassed and berated her.

By decision dated May 23, 2011, OWCP denied appellant's claim, finding that appellant failed to establish any compensable factors of employment as she failed to substantiate her claims of harassment, discrimination, and malfeasance.

In a June 22, 2011 appeal request form, appellant requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. At the hearing, held November 7, 2011, appellant, through her attorney representative, at that time, reiterated her allegations against the employing establishment. Following the hearing, she submitted additional evidence. A former EEO manager provided a November 16, 2010 statement asserting that in 2002, Supervisor R.C. told appellant that Nigerians were stubborn, inflexible, and disliked by their coworkers. Appellant also submitted May 2011 documents regarding an employing establishment settlement offer, with no admission of wrongdoing or final agreement.

Dr. Antonius D. Brandon, an attending licensed clinical psychologist, provided reports from December 27, 2010 to August 5, 2011 diagnosing recurrence major depressive disorder and post-traumatic stress disorder, with "severe" difficulties at work. Dr. Hoenshell opined in an October 21, 2010 report that there was a "clear correlation between severity of symptoms and degree of job stress." He released appellant to part-time work at the employing establishment as of August 11, 2011.

By decision dated January 12, 2012, an OWCP hearing representative affirmed the May 23, 2011 decision, as modified, finding that appellant established as factual and compensable that Supervisor R.C. used ethnic slurs against her in 2002. OWCP denied the claim, however, as the medical evidence did not contain adequate rationale explaining how and why the established work factor of ethnic slurs would cause the claimed emotional condition.

In May 2013 appellant provided tracking and subpoena request documents related to her case against the employing establishment in the U.S. District Court for the Central District of California.

In a letter dated and received by OWCP on November 23, 2016, appellant requested reconsideration. She asserted that she was unable to submit additional evidence following the November 7, 2011 hearing because the denial of her claims caused a psychiatric breakdown. Appellant noted that a federal civil court case against the employing establishment was settled in November 2013. She reiterated her allegations of harassment and adverse employment actions.

By decision dated December 16, 2016, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Section 8128(a) of FECA³ does not entitle a claimant to a review of an OWCP decision as a matter of right.⁴ This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.⁵ OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of the last merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the received date) in the Integrated Federal Employee's Compensation System (iFECS).⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).⁷

In those cases where requests for reconsideration are untimely filed, OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to section 10.607(b) of its regulations.⁸ OWCP regulations and procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.⁹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which decided by OWCP.¹⁰ The evidence must be positive, precise and explicit and must be manifest on its face that OWCP committed an error.¹¹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹² It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹³ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

⁵ *Id.*; see also *Jesus D. Sanchez*, 41 ECAB 964 (1990).

⁶ 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in OWCP's limitation of its discretionary authority; see *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁷ 5 U.S.C. § 10.607(b); *supra* note 4, *Jesus D. Sanchez*, *supra* note 5.

⁸ *Supra* note 4.

⁹ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

¹⁰ *Supra* note 4.

¹¹ *Leona N. Travis*, 43 ECAB 227 (1991).

¹² *Jesus D. Sanchez*, *supra* note 5.

¹³ *Supra* note 11.

record and whether the new evidence demonstrates clear error by OWCP.¹⁴ The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant's reconsideration request was untimely filed. In a letter dated and received by OWCP on November 23, 2016, appellant requested reconsideration. As more than one year elapsed from the most recent merit decision, dated January 12, 2012 her request for reconsideration was untimely.¹⁶

Consequently, the Board finds that appellant failed to demonstrate clear evidence of error.

On reconsideration appellant submitted her November 23, 2016 letter reiterating her allegations of supervisory harassment and malfeasance. Following OWCP's January 12, 2012 decision, appellant also submitted tracking and subpoena request documents related to a federal civil court case against the employing establishment.

The term clear evidence of error is intended to represent a difficult standard, and the argument appellant provided on reconsideration is not the type of positive, precise, and explicit evidence which manifested on its face that OWCP committed an error.¹⁷ Appellant's November 23, 2016 letter and court documents are of insufficient probative value to shift the weight in her favor and raise a substantial question as to the correctness of the January 12, 2012 decision. The critical issue in the claim at the time of the January 12, 2012 decision was the lack of medical evidence establishing causal relationship. As appellant's letter and the court documents do not constitute medical evidence, they are irrelevant to the underlying issue of causal relationship.¹⁸ Accordingly, they are insufficient to demonstrate clear error by OWCP with respect to the denial of appellant's occupational disease claim.

The Board finds that appellant has failed to support her reconsideration request with evidence or argument demonstrating that OWCP's January 12, 2012 decision denying her emotional condition claim was clearly erroneous. Appellant's request was insufficient to raise a substantial question as to the correctness of OWCP's January 12, 2012 decision or shift the weight of the evidence in her favor.

¹⁴ *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁵ *Gregory Griffin*, *supra* note 6.

¹⁶ 20 C.F.R. §§ 10.607; 10.608(b).

¹⁷ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹⁸ *Supra* note 4.

On appeal appellant reiterates her allegations of supervisory harassment, discrimination, and malfeasance. She contends that the medical evidence of record is sufficient to establish her claim. These arguments pertain to the merits of the claim, which are not before the Board on the present appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration, as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2016 is affirmed.

Issued: January 11, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board